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IN THE SPIRIT OF CRAZY HORSE:[†] THE CASE OF LEONARD PELTIER

By Yvonne Bushyhead*

Leonard Peltier, a Native American of Anishinabe/Lakota descent, gets up at 6:30 a.m. with the other prisoners in Leavenworth Federal Penitentiary in Kansas. He eats when they eat and, like everyone else, has to be in his cell at 10:00 p.m. for the last countdown of the day. There is one distinct difference between Peltier and the other prisoners at Leavenworth — widespread solidarity outside the prison.

Since his controversial conviction in 1977 for the murder of two FBI agents, support for Peltier has taken on international dimensions. Many Indian tribes have passed Tribal Resolutions supporting justice for Peltier. Fifty-five members of the United States Congress have signed an *amicus curiae* brief supporting an appeal of Peltier's conviction. The Archbishop of Canterbury, Bishop Desmond Tutu, the Reverend Jesse Jackson and Amnesty International are among the forty-seven religious leaders and groups that have also signed *amici* to date. Peltier's supporters have gathered some twenty-three million signatures worldwide urging a reversal. In 1986, the Spanish Human Rights Commission awarded Peltier its International Human Rights Prize, because he defended his people, their land rights and culture. There are also several films currently in production that explore the case, including a proposed feature by the Academy-Award winning director Oliver Stone. Since Nelson Mandela's release in the spring of 1990, Leonard Peltier has become the world's best-known political prisoner.

The focus of this solidarity is a complicated case which refuses to go away, and a man determined to win his freedom — optimistic that he'll someday be released,

but braced for what is proving to be one of the most contentious cases in American history.

Personal and Social History of Leonard Peltier

Leonard Peltier was born on September 12, 1944, at Grand Forks, North Dakota. Peltier is enrolled in the Turtle Mountain Chippewa Tribe in Belcourt, North Dakota.

In 1950, Leonard, at age six, and the Peltier family moved to Butte, Montana, where many other Indian families were living, to work in a copper mine. It was here that Peltier first encountered racial prejudice. "One day three white kids about my age started yelling, 'Hey, you dirty Indian, go home,' and started throwing rocks at me. I wondered what they were talking about. I did not start throwing rocks until I was hit hard and almost crying."¹ Peltier spent some time wondering what a "dirty Indian" was. This was the first of many such incidents.

Peltier spent his elementary school years in a Bureau of Indian Affairs (BIA) boarding school. "One fall a government car drove up while I was outside playing. My grandmother started crying and went into the house. She called us in and told us this man was here to take us kids to Wahpeton Indian School. We did not own any suitcases, so she put our belongings in a bundle and we went off to Wahpeton, North Dakota." The adults at boarding school lined up the boys in military fashion and forced them to march wherever they were to go. Every boy's hair was cut military style. Each boy was stripped, and powdered DDT was poured on his head. Then they were marched in line for a shower. In remembering those days, Peltier stated, "it's really difficult for someone who comes from a low level of poverty to describe a situation like this. I mean, the disciplinary measures used in school were very harsh, but we had a clean bed and a regular meal every day. My sister, cousin and I became very

[†] Used with permission of Peter Matthiessen.

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1. Quotes from Leonard Peltier are from Peter Matthiessen, *IN THE SPIRIT OF CRAZY HORSE* (1980), from other published accounts of his case, or from interviews with Peltier conducted by the author.

close to one another — all we had in the world was ourselves. I used to lie in bed at night thinking, 'What the hell happened?'"²

At age fourteen, in the ninth grade, Peltier quit school and got a job in a potato house. "The whole family — grandparents, aunts, uncles and children — would migrate from Turtle Mountain to the Red River Valley to work in the potato fields. Indians were hired to pick spuds at three to four cents a bushel, while Mexican Indians worked the sugar beets." Peltier was convinced this was the solution to the continual lack of money, food and clothing the family of three brothers and six sisters had come to know.

When Peltier was seventeen, he began in earnest to search for others who cared and could share his understanding of life experiences of racial prejudice, personal problems, and poverty. He attended meetings for several causes, and when he learned of the American Indian Movement (AIM), his life took a course from which he has never since wavered. Leonard Peltier became one of the leaders of the American Indian Movement, and quickly developed a reputation as an activist dedicated to the protection of his people and the environment. He became known as an outspoken dissenter against the government's illegal treatment of Native Americans' human rights and land treaties. As a result of Peltier's commitment and activism, however, he found himself a target of a fraudulent Federal Bureau of Investigation (FBI) and Justice Department prosecution, which has cast a shadow over his life for the past fifteen years.

Taking a Stand Against Injustice Toward Native Americans

The 1960s awakened protest against the systematic violation of civil and human rights that was the day-to-day fare of minority peoples in America. Racial discrimination, police repression and abject poverty were facts of life no longer to be tolerated. For Indian people, the issues were compounded by the government's historical refusal to honor its treaties, and by the rampant exploitation of Indian lands in the hands of mining interests and non-Indian farmers and ranchers. The pattern of broken treaties, dishonesty, prejudice, discrimination, tragic violence and genocide which has characterized the United States' treatment of Native Americans is well-documented.³

Indian resistance erupted in the mid-1960s around the intrusion on treaty fishing rights in the Northwest. News of the "fish-ins" asserting treaty rights triggered an increased militancy across the country as Indian people recognized and became determined to correct injustices. Groups including the American Indian Movement (AIM) began to organize and demand change.

The American Indian Movement was organized in 1968 in Minneapolis, Minnesota, to challenge the city's discriminatory, and often brutal, treatment of Indian citizens. At the direction of traditional elders, the focus of AIM shifted to treaty issues. Activists began seizing federal property to dramatize the demand to restore tribal lands. The capture of Alcatraz Island in San Francisco Bay in 1969 came to symbolize the Indian struggle for land and sovereignty, and gave energy to a growing unrest that, in 1972, would move across the country as the "trail of broken treaties."⁴

The intent of the hundreds of Indians who caravanned to Washington, D.C. on the eve of the 1972 election was to present the two presidential candidates with a twenty-point program for reorganizing Indian-government relations and investigating treaty violations.⁵ After receiving a cold shoulder from the BIA, and learning of an interior department memo instructing the BIA to offer "no direct or indirect assistance," they seized the BIA headquarters.⁶

After a week, participants were offered a response to their twenty-point proposal, and amnesty from prosecution, if they would leave. The promised response came in January, 1973, touting Nixon's new Indian policy, and rejecting wholesale the possibility of treaty reform. While no one was charged in connection with the takeover, AIM leaders, including Leonard Peltier, were targeted by the FBI under its Counter-Intelligence Program for surveillance and "arrest . . . on every possible charge, until they can no longer make bail," according to a memo leaked from then-Attorney General Saxbe's files.⁷

During the late 1960s and early '70s, the FBI was actively engaged in the systematic harassment, surveillance and infiltration of the American Indian Movement, the Black Panther Party, the National Association for the Advancement of Colored People (NAACP), the National Lawyers Guild, and numerous other groups expressing political dissent. This covert program against activists in the United States, dubbed COINTELPRO, ran officially from 1953 to 1971, but the disruptive tactics continued after that date.

The FBI's activities during this period later came under close scrutiny, culminating in the 1975 report of the Senate Select Committee on Intelligence, headed by Senator Frank Church. The Bureau's actions were blasted by the Committee, which noted; "[T]he chief investigative branch of the Federal Government, which was charged by law with investigating crimes and preventing criminal conduct, itself engaged in lawless tactics and responded to

2. See Matthiessen (cited in note 1) at 46.

3. See, e.g., Brown, *BURY MY HEART AT WOUNDED KNEE* (1970), Neihardt, *BLACK ELK SPEAKS* (1961), Hoig, *THE SAND CREEK MASSACRE* (1961), McGregor, *THE WOUNDED KNEE MASSACRE FROM THE VIEWPOINT OF THE SURVIVORS* (1940), and Vine Deloria, Jr., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (1974).

4. See Deloria (cited in note 3).

5. Michael W. Hirschorn, *Newly Released Documents Provide Rare Look at How FBI Monitors Students and Professors*, *CHRONICLE OF HIGHER EDUCATION* February 10, 1988, at A1.

6. Ward Churchill and Jim VanderWall, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* at 122-23 (1988).

7. *Id.* at 466 n.105.

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FBI Shoot My House
Credit—Leonard Peltier

deep-seated social problems by creating violence and unrest.”⁸ The report clearly established that the FBI was going beyond its intended investigatorial functions.

In the early '70s, tensions were mounting on the Pine Ridge reservation in South Dakota over the corrupt government of tribal chairman Dick Wilson, whom traditional people opposed at risk of retaliation from Wilson's private security force. With federal backing, Pine Ridge entered into a state of siege: the United States Marshall's Special Operations Group mounted machine guns on the roof of the BIA building in Pine Ridge, roving police stopped anyone “suspicious” on site, and Wilson's Guardians of the Oglala Nation (referred to as GOONs) terrorized outlying towns.

Violence spread across the reservation. People were shot at, beaten and harassed. In January, 1973, Wesley Bad Heart Bull was murdered in cold blood in the border town of Buffalo Gap, South Dakota. A protest against the

lenient charge against his white assailant was met with a police riot and the arrest and conviction of twenty-six demonstrators, including Bad Heart Bull's mother, Sarah.

“Although it hurts me deeply, I am forced to the conclusion that the prosecution in this trial had something other than obtaining justice in its mind. The fact that incidents of misconduct formed a pattern throughout the course of the trial leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice.” — Judge Nichol, United States v. Banks (1974)

In desperation, the traditional Oglala Sioux Civil Rights Organization summoned AIM leaders to a meeting in Calico, where it was decided that armed resistance was the only recourse to stem the terror and injustice on the Pine Ridge reservation. On February 27, 1973, the American Indian Movement occupied the town of Wounded Knee — the site of the ruthless army massacre of Chief Big Foot's band in 1890 — and within three weeks, declared the independent Oglala Nation. For seventy-one days, the people of Wounded Knee withstood the onslaught of federal troops, SWAT teams, FBI agents, and state marshals equipped with Vietnam-era weapons, armored personnel carriers and helicopters. The occupation put into play a Pentagon war game, code-named “Garden Plot,” under the direction of the Joint Chiefs of Staff. Two Indian people — Frank Clearwater and Buddy Lamonte — lost their lives on May 8. Finally, in exchange for Congressional and White House talks regarding conditions on Pine Ridge, the people at Wounded Knee disbanded. The talks were soon to become another broken promise. Wilson consolidated his despotic reign on the reservation, and the federal government, with the illegal tactics of the FBI at its disposal, geared up to prosecute and dismember the American Indian Movement. Leonard Peltier, aware that he was targeted by the FBI, moved underground.

The resistance at Wounded Knee, however, had caught the attention and imagination of peoples worldwide who rallied in support of Indian sovereignty, and would come to see Leonard Peltier as the symbol of an ongoing struggle to right the wrongs of the last five hundred years.

FBI Misconduct in the Wounded Knee Case

The 1974 nine-month federal prosecution of Dennis Banks and Russell Means,⁹ co-leaders of the American Indian Movement occupation of Wounded Knee, was dis-

8. See Amnesty International, PROPOSAL FOR A COMMISSION OF INQUIRY INTO THE EFFECT OF DOMESTIC INTELLIGENCE ACTIVITIES ON CRIMINAL TRIALS IN THE UNITED STATES OF AMERICA (1981) at 17.

9. *United States v. Banks*, 383 F.Supp. 389 (D.S.D. 1974).

missed because of massive FBI misconduct. The misconduct by the FBI in this case included withholding and doctoring FBI files, the placement of an informer (Douglas Durham)¹⁰ within the defense team, and subornation of perjury.¹¹ These actions were part of the Bureau's arsenal of techniques for the disruption of groups during the official span of COINTELPRO, although they occurred three years after COINTELPRO allegedly ended. Attorney William Kunstler further described the prosecution's misconduct as including failure to verify the testimony of a key witness in light of overwhelmingly contradictory information; failure to inform the court of the FBI's intervention in a rape investigation of that same witness; offering testimony which was directly contradicted by a document in its possession; and failure to provide relevant information regarding the extent of the United States military involvement in the occupation.¹²

The trial judge, Chief Judge Fred Nichol, dismissed charges against the defendants after concluding that the prosecution had acted in bad faith. One of the instances of improper conduct that particularly troubled Judge Nichol was the misrepresentation of Special Agent Trimbach that there were no wiretaps at Wounded Knee. Judge Nichol stated in his opinion that,

I still find the Joseph Trimbach incident particularly disturbing. Trimbach testified that he had neither seen nor signed an affidavit supporting a request for a wiretap authorization. This, it developed, was untrue. It is incredible that a person in Trimbach's position, and involved in a "limelight" case could suffer from such a grievous lapse of memory. Furthermore, when Trimbach's affidavit finally surfaced, the defense team was provided only the middle page of its three pages. The page bearing Trimbach's signature was conspicuously absent. The whole Trimbach scenario is extremely bizarre and it is increasingly difficult for me to believe that the government was making an honest effort to comply with my discovery orders.¹³

In dismissing the prosecution in the AIM case, Judge Nichol stated,

although it hurts me deeply, I am forced to the conclusion that the prosecution in this trial had something other than obtaining justice in its mind.

10. On June 23, 1975, the Senate Select Committee investigating intelligence activities wrote to Attorney General Levi, informing him that the committee wished to interview various FBI agents and Assistant U.S. Attorney R.D. Hurd, regarding activities of undercover operative Douglas Durham. Senator Church wrote, "[t]his investigation may involve specific allegations of abuse or other controversial matters where there is reason to believe improprieties have occurred."

11. See generally Churchill and VanderWall (cited in note 6). Douglas Durham, a non-Indian who was hired by the FBI to infiltrate AIM, is reportedly responsible for many acts, unauthorized by AIM, designed to create a false image of AIM as a militant violence-prone organization.

12. Kunstler, interview with the author, April 1990.

13. *Banks*, 383 F.Supp. 389.

In deciding this motion, I have taken into consideration the prosecution's conduct throughout the entire trial. The fact that incidents of misconduct formed a pattern throughout the course of the trial leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice. The waters of justice have been polluted and dismissal, I believe, is the appropriate cure for the pollution in this case.¹⁴

Background to the Peltier Case

The case of Leonard Peltier is an example of the United States Justice system's failure to guarantee a person's right to a fair trial. A pattern of illegal and unethical conduct by the United States Government set the stage for the events that led to the shootout at Pine Ridge and the subsequent "witch hunt" prosecution of Leonard Peltier.

In March, 1975, the Oglala Sioux Civil Rights Organization requested AIM members to set up camp on the Jumping Bull Compound, which is located on the Pine Ridge Reservation. AIM involvement was needed and requested because of a rash of violence and mysterious disappearances of Indians across the Pine Ridge Reservation — most of whom were AIM members and supporters who were in opposition to the tribal government at the time. Sixty-five AIM members and supporters died and are believed to have been murdered on the Pine Ridge Reservation between 1972-76. These cases were seldom investigated by BIA Police or the FBI and almost never solved. Pedro Bissonette, head of the Oglala Sioux Civil Rights Organization, was shot several times at point-blank range by the BIA for allegedly "resisting arrest." AIM advocate Byron DeSersa was killed by Pine Ridge Tribal President Richard Wilson's private army, the "GOONS." DeSersa, unarmed and outnumbered, was prevented by the GOONS from receiving medical attention after being wounded, which might have saved his life. While the FBI did not actively prosecute the case, one of the GOONS was arrested in a neighboring town and charged with first degree murder. He was convicted, and his sentence was limited to two years in return for testimony against others allegedly involved.

In April 1975, the FBI conducted a study of its "paramilitary operations" preparedness on Indian land.¹⁵ That May, there was a build-up of FBI personnel (an estimated sixty agents), including SWAT¹⁶-trained personnel, on and near the reservation. On June 16, 1976, the FBI again added to its personnel in the area, ordering

14. *Id.* at 397.

15. See Memorandum, Gebhardt to O'Connell, The Use of Special Agents of the FBI in a Paramilitary Law Enforcement Operation in the Indian Country, April 24, 1975, exhibit in Peltier's trial before Judge Benson. The Submission of Disputed Facts in Pre-Sentencing Investigative Report prepared by Peltier's attorneys Bruce Ellison, William Kunstler and Robert French, also details FBI activity prior to the firefight.

16. Special Weapons and Tactics.

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*Celo Black Crow, Lakota Medicine Man
Credit—Leonard Peltier*

special agents into South Dakota for temporary sixty-day assignments.

During the summer of 1975, negotiations took place between the Oglala Sioux tribal government and the United States, during which it was agreed that one eighth of the Pine Ridge reservation, known as the "gunnery range," was to be ceded to the federal government. Prior to this, numerous multinational corporations had been looking at Indian land for uranium, coal, oil and gas. In 1971, a Natural Uranium Resource Evaluations¹⁷ satellite had discovered a rich uranium deposit in the northwestern area of the Pine Ridge reservation, including the "gunnery range" which was to be ceded. The FBI had noted¹⁸ that the American Indian Movement was against strip mining and other exploitation of Indian lands, and that they insisted that the United States honor its treaties with Native American tribes.

The Firefight

On June 26, 1975 — the same day negotiations were being held for tribal president Wilson to sign over the "gunnery range" — Joseph Stuntz, a young Native American, and FBI agents Jack R. Coler and Ronald A. Williams were shot to death during a firefight between members of the American Indian Movement and the FBI agents on the Pine Ridge reservation. The agents were shot at close range. At least one was apparently killed by a small caliber, high-velocity bullet.

How and why the shooting started is unclear. FBI agents Williams and Coler had driven onto the Jumping Bull compound for the second day in a row following a suspect vehicle. They were ostensibly looking to arrest AIM member Jimmy Eagle on charges of theft of a pair of used cowboy boots. According to trial testimony, the agents had been told that Eagle and three other AIM members were wanted for kidnapping, assault and robbery. As later became clear, Eagle was not even in the area at the time.

Stuntz, according to the official autopsy performed by Doctor W.O. Brown, was killed by a single rifle round from long range, which hit him dead center between the eyes. However, South Dakota's Assistant Attorney General, William Delaney, contradicted that report, stating that Stuntz had received "a burst in the back," at close range.¹⁹ National Public Radio reporter Kevin McKiernan, who arrived at the scene shortly after Delaney, said that Stuntz appeared to have been fitted into an FBI field jacket to cover his torso. McKiernan observed the body leaking blood down the jacket sleeve, and insists that the hole in the forehead story is false. No investigation was made into Stuntz's death, nor was anyone charged in the killing.

On November 25, 1975, the four oldest Indian males thought by the Bureau to have been present at the scene — Robert E. Robideau, Darrelle Dean Butler, James T. Eagle and Leonard Peltier — were indicted jointly for murder, and aiding and abetting the murder of the agents.

17. NURE, a component of the U.S. Geological Survey.

18. See generally Matthiessen (cited in note 1).

19. Id. at 199.

The Murder of Anna Mae Aquash

Anna Mae Aquash was an AIM supporter and a friend of Leonard Peltier. Following the killing of the two agents, FBI investigators apparently believed that Aquash could provide information regarding the killings, and sought to find and interview her. On September 5, 1975, several Indians were arrested at the camp of Al Running for weapons offenses, among them Anna Mae Aquash, who was arrested by Agent Price. Price grilled Aquash about the killings. She later said that she was afraid of Agent Price because he had threatened her life, apparently in the belief that she was withholding information concerning the whereabouts of Butler, Robideau and Peltier.²⁰

Aquash failed to appear in court on the weapons charge, but she was arrested again in Oregon in the company of persons believed to be Peltier and Banks, who escaped. She was returned to South Dakota, and released on personal recognizance by federal Judge Robert Merhige on November 24, 1975; she again failed to appear when required. On February 24, 1976, a body was found in a deserted area of Pine Ridge, near Highway 73. Agent Price, one of the first law enforcement officials on the scene, stated that he was unable to identify the body. Coroner Dr. W.O. Brown concluded that the victim had died from "exposure." (This was the same coroner who had previously concluded that Stuntz had died from a single rifle round in the forehead.) The body was interred in a common grave on the reservation, with its hands severed and sent to the FBI lab in Washington, D.C. for "positive identification." On March 5, the FBI notified Aquash's family in Canada of her death "by natural causes."

The family, skeptical, contacted AIM attorneys in South Dakota, requesting exhumation for a second autopsy. The Wounded Knee Legal Defense Committee chose Gary Peterson, resident pathologist at St. Paul Hospital (in Minnesota), to perform the second autopsy. An x-ray immediately revealed an object in Aquash's left temple, which was found to be a .32 or .38-caliber bullet. Peterson found Aquash's death to have been caused by a handgun fired at point-blank range into the base of her skull. No one was ever charged with her murder, and Agent Price was never deposed on the matter. Subsequent investigation revealed that medical staff present at the time of the first autopsy conducted by the FBI-retained coroner noticed blood caked around the head, and concluded that the report by the FBI coroner intentionally did not disclose all information available regarding possible causes of death.²¹

The First Trial: Peltier's Co-Defendants Acquitted

In the summer of 1976, before Peltier was apprehended, in a lengthy trial Robideau and Butler pleaded self-defense to a jury in Cedar Rapids, Iowa, where their

case, as well as that of Peltier, had been transferred because of local anti-Indian prejudice in South Dakota. During their trial, Butler and Robideau presented evidence of a tremendous fear of the FBI among Indians on the Pine Ridge reservation, supporting their contention that the tragic events of June 26 involved legitimate and reasonable self-defense, and no intent to murder the agents in the course of the massive shootout. In July of 1976, the jury found Butler and Robideau not guilty. Both the judge and the jury noted the sparse evidence against the defendants, and FBI misconduct in preparing evidence. The Justice Department then decided to dismiss the charges against Eagle, the youngest of the four, who had not been present at the shootout, "so that the full prosecutive weight of the Federal Government could be directed against Leonard Peltier," as United States Attorney Evan Hultman, prosecutor in the Reservation Murders (RESMURS) trials, was to state on August 9, 1976.

The FBI was determined to hold someone accountable for the loss of their two agents. Three days after the Robideau and Butler acquittals, FBI Director Clarence Kelley called the Rapid City field office and requested an analysis "as to possible reasons why the jury found the defendants . . . not guilty."²² The reply broadly hinted that the Iowa trial judge had been partial to the defense in a number of important rulings. One of the reasons advanced by the Rapid City office to explain the acquittals was the statement of the jury's foreperson, reported the day after the acquittals, that "the Government did not produce sufficient evidence of guilt. [It] did not show that either of the defendants did it."²³ The Bureau came to the conclusion that "the jury apparently wanted the Government to show that Robideau and Butler actually pulled the trigger at close range."²⁴

Fraudulent Extradition of Peltier From Canada

Following his indictment, Peltier had fled to Canada seeking political asylum, convinced he could not get a fair trial in the United States. Shortly thereafter, the FBI began a new round of investigation, interviewing Native Americans from the Pine Ridge area and other AIM members who knew — or supposedly knew — him to elicit damaging testimony that would constitute grounds for extradition. The result was an egregious instance of investigatory abuse.

The FBI was able to extradite Peltier on the basis of two affidavits obtained from an Indian woman named Myrtle Poor Bear, a character who proved to play a crucial role in the prosecution's case. The FBI had actually extracted three affidavits from Poor Bear. The first stated that she was Peltier's girlfriend, and that she was not at the scene of the shooting, but that Peltier told her afterward that he had shot the two agents. The second affidavit was virtually identical to the first, except for a few

20. Weir and Bergman, *The Killing of Anna Mae Aquash*, *Rolling Stone*, April 7, 1977, at 52.

21. See Mattheissen (cited in note 1).

22. In FOIA documents in the files of the Peltier Defense Committee, Lawrence, Kansas.

23. CEDAR RAPIDS GAZETTE, July 17, 1976.

24. FOIA documents at Peltier Defense Committee, Lawrence, Kansas.

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sentences changed to make the statement read that Poor Bear was in fact at the scene, and saw Peltier shoot the agents. The third affidavit went further, recounting in detail her purported eyewitness account of the shootings. Only the latter two affidavits were submitted to Canada by the United States government to support the extradition.²⁵

The prosecution condoned most of the fraud directly. The case is so saturated with fraud and deceit that nothing about it can be trusted.

Poor Bear had a history of alcoholism and mental illness from childhood. She eventually recanted her claim to have been an eyewitness at the fire, and testified that she had been threatened by federal investigators and prosecutors that she would be harmed, or that her daughter would be harmed or taken away from her, unless she gave the false testimony. In fact, Poor Bear had never met Peltier, and was never in the area of the scene of the shootout. Her testimony was never allowed before the jury in Fargo, where Peltier was eventually tried.

On a national television broadcast, one of Peltier's prosecutors referred to Myrtle Poor Bear as a "fruitcake." He had no problem, however, using her fraudulent affidavits to implicate Peltier in the deaths of the agents for the purposes of extradition.²⁶

In Canadian hearings reviewing the extradition after the fact, the United States government and federal prosecutors admitted that the affidavits used to extradite Peltier were indeed false. That concession led one federal appellate court to characterize their use as a "clear abuse of the investigative project by the FBI."²⁷ And in April 1978, after Peltier had been extradited, tried, convicted and imprisoned, British Columbia Supreme Court Judge R.P. Anderson commented, "It seems clear to me that the conduct of the United States government involved misconduct from its inception."²⁸

The Trial of Leonard Peltier

Peltier was tried before a jury in Fargo, North Dakota. His case had been mysteriously shifted to Judge Benson in Fargo, from Cedar Rapids Judge McManus, who had originally received Peltier's case along with those of Robideau and Butler on transfer because of local anti-Indian prejudice in South Dakota. No explanations have ever been given to the defense regarding the switch of judge and venue. The *ex parte* communication between

Judge Benson (who received the case in Fargo) and the FBI, which were designed to ensure that the judge and venue for Peltier's prosecution were favorable to the government, represent a distinct case of prosecutorial and judicial misconduct — a phenomenon not new to Indians in Indian country.

The Oglala Civil Rights Commission witnesses who gave testimony in the Butler-Robideau trial regarding the climate of fear and other conditions on the Pine Ridge reservation prior to the fire, were not allowed to testify in the Peltier trial. The government had listed Myrtle Poor Bear as a witness, but after four government witnesses testified that Poor Bear had never been seen or heard of in the Jumping Bull compound where the shootings occurred, and after the government's chief investigator stated that he had no knowledge of how or when she became an informant, the government elected not to call her as a witness.²⁹

The defense then sought to call her to show that the government had resorted to fabrication of evidence, obstruction of justice, subornation of perjury, and intimidation, and to explore the bias and hostility of two government witnesses, Agents Woods and Price. The court refused to allow the jury to hear Poor Bear's testimony, which she gave as an offer of proof outside the jury's hearing. Several other key rulings on admissibility of evidence made by Judge Benson, were the direct opposite of those made by Iowa Judge McManus in the prior trial of Butler and Robideau, denying Peltier the full benefit of his defense.

The bulk of the testimony used to convict Peltier has been proved to be fabricated or simply false. Several witnesses who testified before the jury and Judge Benson have filed affidavits recanting their statements. What remains of the evidence on which Peltier was convicted, is purely circumstantial.

AIM member Wilford Draper, after being arrested by the FBI on alcohol and armed robbery charges on January 9, 1976, signed a statement and testified to a grand jury implicating Peltier, Butler and Robideau in the deaths of the two FBI agents. After he signed the statement, all charges against Draper were dropped. However, at Peltier's trial, Draper testified that his grand jury testimony was false, and that its content had been "suggested" by the FBI. This FBI "suggestion" came during the three hours they had Draper handcuffed and tied to a chair.³⁰

29. FBI testimony before the House Judiciary Committee's Civil and Constitutional Rights subcommittee on April 2, 1981, indicated that the reason the prosecutor did not call Poor Bear as a government witness in the Peltier trial was that she appeared too emotional to withstand cross-examination, and that her recantation was attributable to fear of retribution from AIM. This explanation is at considerable variance with the statement by U.S. Attorney Hultman to the Eighth Circuit, that the reason that he did not call Poor Bear as a trial witness was that she was not in fact present at the events she claimed to have observed in her affidavits, that anyone who talked to her would realize that she was not a believable witness, and that her account did not check out with that of any other person.

30. Transcript of Proceedings (hereinafter Trans.), *U.S. v. Peltier* in the District of North Dakota, Vol. V, at 841-844.

25. See the account of the Poor Bear story in Matthiessen (cited in note 1) at 297-98.

26. West 57, CBS News broadcast, April 29, 1989.

27. *United States v. Peltier*, 585 F.2d 314 at 335 n.18 (8th Cir., 1978), cert. denied, 440 U.S. 945 (1979).

28. Matthiessen (cited in note 1) at 325.

Law and Liberation

In September 1975, the FBI told AIM member Norman Brown that, if he did not speak against Leonard Peltier, he might never walk the earth or see his family again. Brown testified that, as a result, he became very

"There is a possibility that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available to him. . . . Yet, we are bound by the Bagley test requiring that we be convinced, from a review of the entire record, that had the data and records withheld been made available, the jury probably would have reached a different result. We have not been so convinced." — United States v. Peltier, Eighth Circuit, 1986

frightened. On January 13, 1976, he testified to the grand jury in South Dakota implicating Peltier, Butler and Robideau in the agents' deaths. But despite having been guaranteed immunity from prosecution, Brown later repudiated his grand jury testimony in the Peltier trial.³¹

Mike Anderson, a fifteen-year old AIM member who was present at the firefight, was arrested in Wichita, Kansas, on September 10, 1975, and charged with nine offenses including firearms and explosives violations. Anderson eventually agreed to testify at the Peltier trial, and the Wichita charges against him (carrying a potential ninety-year total sentence) were dropped.³² Anderson testified that the FBI threatened him with bodily harm if he didn't give the answers that the agents wanted, and that he then gave them those answers. His testimony at trial was contradictory, but was the primary means by which the prosecution attempted to establish that the two FBI agents had followed a red-and-white van (which they associated with Peltier) onto the Jumping Bull compound, rather than the orange or red pickup, Jeep or Scout reported by the agents themselves prior to their deaths.

Mike Anderson died under suspicious circumstances on the Navajo reservation shortly after the trial. No autopsy or investigation was conducted. Years later, via a Freedom of Information Act (FOIA) request by Peltier's defense team, documents were obtained showing that the FBI at trial had suppressed evidence that the vehicle the agents chased onto the Jumping Bull compound was in fact a red pickup, Scout or Jeep, and not a van purportedly connected to Peltier. Even the attribution of the van to Peltier was a mistake. It was originally owned by Donald Matthew Loud Hawk, who gave it to Joseph

Stuntz. The documents withheld from the defense at trial (and for years thereafter) by the FBI, show that Loud Hawk was considered a suspect by the FBI.

Evan Hodge, a Washington-based FBI firearms identification specialist, testified to the jury that a .223-caliber shell casing found in the open trunk of FBI Agent Coler's car, just a few feet from his body, was attributable to an AR-15 rifle connected with Peltier, but that he could reach no conclusion as to whether the gun had actually fired the bullet from that casing because of the damage to its firing pin and breech face surfaces. Since the pathologists who had conducted the autopsies on the victims testified that they had both been killed by a high-velocity, small caliber weapon such as an AR-15, fired at close or point-blank range, Hodge's testimony was extremely damaging to Peltier, and was characterized by United States Attorney Crooks in his summation, as "the most important piece of evidence in this case."³³ This argument, and its effect on the jury, would be central in the later development of the Peltier case.

During the trial, the prosecution argued that Peltier had a motive for the killing of the two agents, in that he was wanted at the time in connection with an attempted murder charge in Milwaukee. The prosecution argued that Peltier was concerned that the agents had come to arrest him on that charge. However, when Peltier was later tried in Milwaukee in 1978, he was acquitted. Evidence was disclosed that the alleged attempted murder was a fight that was set up by an off-duty policeman and his partner, who actually had provoked the fight and beaten Peltier. The officer (and alleged victim) had bragged to his then-girlfriend, waving a picture of Peltier, that he was helping the FBI "catch a big one."³⁴

On April 18, 1977, after five weeks of prosecution and two days of defense, the North Dakota jury made a decision. Judge Benson handed down a verdict of guilty on two counts of murder.

Sentencing

On June 1, 1977, after he had presented the emotion-packed statement he had prepared,³⁵ Leonard Peltier was sentenced by an obviously upset Judge Benson to the most severe punishment at his disposal — two life terms to run consecutively. Due to an error of primary trial counsel, no record of disputed facts was presented to the sentencing court, either orally or in writing. Therefore, Peltier was sentenced based upon an inaccurate Pre-Sentence Investigative Report (PSI), without a meaningful opportunity to dispute the false and malicious statements of fact included in it.³⁶

33. Trans. at 4996.

34. Churchill and VanderWall (cited in note 6) at 344.

35. Reproduced below.

36. For details of disputed facts in the PSI Report, see *Submission of Disputed Facts in Pre-Sentence Investigative Report*, prepared by Peltier's attorneys. One example of improper material in the pre-sentence report is the discussion of such adolescent behavior as hot rodding and stealing beer, and of Peltier, as a teenager, taking fuel for heating the family home when they couldn't afford to buy fuel. These teenage behaviors

31. Trans. Vol. XXII, at 4799-4846.

32. Trans. Vol. V, at 841-844.

*In the Spirit of Crazy Horse***The Appeal of Conviction**

Peltier appealed his convictions. In December 1977, oral arguments were heard on Peltier's appeal in St. Louis. Judge William Webster was one of the three-judge panel hearing the case. The next month, January 1978, William Webster was named Director of the FBI. On September 14, 1978, Peltier's appeal was denied. In confirming Peltier's convictions, the reviewing court found that although "the evidence against [him] was primarily circumstantial . . . the strongest evidence" included the testimony of Evan Hodge, linking the shell casing from Coler's car to Peltier.³⁷

The Prison Murder Plot Against Peltier, and His Escape

On July 20, 1979, Peltier, with the assistance of Bobby Garcia, Dallas Thundershield, and Roque Duenas, escaped from Lompoc Federal Prison, motivated by the conviction that he was in imminent danger of being killed in prison. Dallas Thundershield was shot in the back and killed during the escape. On October 2, 1981, Roque Duenas' fishing boat was found upside down, his nephew dead after being hit with a blunt instrument and drowning; Duenas was missing. Duenas is still missing. On December 13, 1990, Bobby Garcia was found dead in his jail cell.

During a hearing in July, 1985, on a transfer motion for an inmate at the Medical Center for Federal Prisoners, inmate Robert Hugh Wilson, also known as Standing Deer, testified that a federal prison official had asked him to kill AIM activist Leonard Peltier. He and Peltier were both serving sentences in the federal maximum security prison in Marion, Illinois, at the time. Standing Deer, a Native American, said two men approached him with a deal in May 1978, and agreed to provide him immediate medical treatment and to drop seven detainees against him if he agreed to neutralize Peltier. (The detainees would have allowed Standing Deer to be returned to Oklahoma City to be tried for several crimes, including killing a policeman, when his federal sentence ended.) Standing Deer testified that the chief correctional supervisor came to his cell one day with a "stranger."

The stranger said that if I would cooperate in 'neutralizing Leonard Peltier,' he would see that I received immediate medical treatment, and, after I had cooperated with him, he would get me paroled from the federal system . . . I asked him who he represented, and he replied he was a person who had the power to do what he promised . . . [He said] '[d]on't even think of playing us for fools, because at this point it's Peltier's life or yours. We don't accept backing out or betrayals. You are now committed to this with your life. If you betray us you will die.'³⁸

are irrelevant to evaluating Leonard Peltier as an adult. Peltier has no prior felony convictions.

37. *United States v. Peltier*, 585 F.2d 314 at 319-20 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

38. From Standing Deer's deposition for his transfer hearing;

Standing Deer's attorney, Margaret G. Gold, said her client had never been allowed to testify about the murder plot until this (transfer motion) hearing. The hearing was prompted by a lawsuit by Peltier, Standing Deer and Albert Garza, alleging that they were denied freedom of religious worship and kept in solitary confinement because they spoke out against the federal prison system. Prior to the hearing, Peltier and Garza were transferred to other federal prisons.

After Peltier's recapture, his escape trial began on November 14, 1979. Judge Lawrence Lydick denied Peltier the opportunity to present his "duress and coercion" defense, and prohibited Peltier from presenting evidence of his reasons for fleeing prison. On January 22, 1980, Peltier was convicted and given the maximum seven-year sentence for escape and possession of a weapon. Garcia was sentenced to five years for escape. On appeal, Peltier's escape conviction was reversed by the Ninth Circuit Court of Appeals.³⁹ The case was remanded, and on remand the conviction was affirmed.⁴⁰

The Supreme Court Denies Certiorari

On January 10, 1979, an around-the-clock vigil began outside the Supreme Court. It continued for fifty-five days and nights, through bitter weather. On February 11, in zero-degree temperatures, a protest march demanding a Supreme Court review of Peltier's case was harassed by dozens of police, many of them in riot gear. The next day, the Supreme Court refused to review the original Peltier case.

Peltier's FOIA Suit Reveals Withheld Evidence

In 1981, four years after the trial, Peltier obtained through the Freedom of Information Act approximately twelve thousand pages of documents from the FBI that the prosecution improperly withheld from the defense at trial. Many of these had sections blacked out by the FBI. The FBI continues to withhold approximately six thousand pages of documents on the Peltier case on national security grounds.

The Motion for a New Trial and Appeal

Among the material withheld by the prosecution, which Peltier obtained through the FOIA, were a number of documents relating to the FBI's ballistics examination. One document was an October 2, 1975 teletype from Evan Hodge to the FBI resident agency at Rapid City, South Dakota — the field office in charge of the overall investigation. That document stated that a comparison between the .223-caliber casings found at the shootout scene — referred to in FBIese as RESMURS — and Peltier's AR-15, revealed that the weapon in question

reproduced in Churchill and VanderWall (cited in note 6) at 355-6.

39. Unpublished memorandum decision of the 9th Circuit, March 20, 1981.

40. *United States v. Peltier*, 609 F. Supp. 1143 (D.N.D. 1985).

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contained "a different firing pin than that in [the] rifle used at [the] RESMURS scene." Further, an October 31, 1975, teletype stated that "none of the ammo" components at RESMURS could be associated with Peltier's weapon.

On April 11, 1982, a writ of *habeas corpus* was filed in federal district court in North Dakota on the grounds that the prosecution had used false evidence and suppressed exonerating evidence in the Peltier trial. A motion for a new trial was also made in 1982, on the grounds of newly discovered evidence.⁴¹ Judge Benson was asked to recuse himself. In December of 1982, Judge Benson denied the motion, refused to step down from the case, and refused to order the FBI to release the thousands of pages of documents related to Peltier's case that they had withheld in response to the FOIA request. Peltier appealed. The Court of Appeals ordered Judge Benson, who had presided at the Fargo trial, to grant a hearing to consider the evidence discovered through the FOIA, specifically, "the meaning of the October 2, 1975 teletype and its relation to the ballistics evidence introduced at Peltier's trial."⁴²

Mandamus Petition to Remove Judge Benson For Bias

Prior to the evidentiary hearing, Peltier's attorneys petitioned the Court of Appeals to issue a writ of *mandamus* removing Judge Benson from the case on the grounds that statements he had made out of court showed bias against Native Americans generally, and against Peltier in particular. The Court of Appeals postponed a decision on the petition to remove Judge Benson pending the outcome of the hearing.

Evidentiary Hearing Before Judge Benson and Denial of New Trial

The evidentiary hearing took place in Bismarck, North Dakota, October 1 - 3, 1984. Hodge, who was the only witness produced by the government, testified that by the time of the October 2 teletype, he had only been able to examine seven of the one hundred thirty-six or so .223-caliber RESMURS casings submitted to him for comparison. In fact, he hadn't gotten around to looking at Exhibit 34-B, which he had received on July 24, 1975, until late December 1975 or early January 1976, more than a half-year after the Pine Ridge confrontation and some three months following his receipt of the AR-15. However, he freely admitted that he was constantly being requested by the Rapid City office to test every .223-caliber casing forwarded to him against any AR-15 associated with the June 26 incident. His failure to do so promptly, he explained, was due to a number of factors — the large volume of work connected with the RESMURS investigation, his necessary absences from Washington on other FBI business, and the fact that only he and one assistant were available for firearms identification purposes.

Other inconsistencies were discovered regarding "the most important piece of evidence" (the .223-caliber shell casing allegedly found in the trunk of the FBI agents' car.) First, two different FBI agents made statements claiming that each had found the casing — on different days. Second, the key shell casing was not included in the shipment of items (including two thousand ammunition components) recovered at the scene and "from processing the two FBI automobiles," described as the "important evidence;" it was sent a few weeks later.

While Hodge was on the stand, Peltier's attorneys were given an opportunity, for the first time, to look at the handwritten notes among his RESMURS work. In doing so, they noticed that his key report — the one stating that the extractor marks on Exhibit 34-B matched Peltier's AR-15 — contained what looked like different

Judge Benson denied the request for a new trial "because the October 2, 1975 teletype . . . would not have affected the outcome of the trial, and does not create a reasonable doubt that did not otherwise exist. Peltier has failed to establish constitutional error."

handwriting than that of either Hodge or his assistant. Accordingly, just before the hearing's end, Hodge was asked whether a third person had worked on the RESMURS ballistics, and he replied that none had. He also contended that the writing on the report in question was indeed that of his assistant.

The defense then asked Judge Benson for permission to have all of Hodge's notes examined by a handwriting expert. After listening to strenuous objections from government counsel, who claimed that this request was a complete waste of time and money, the court granted Peltier's motion. The original notes were to be examined by an expert selected by the defendant's attorneys at the FBI laboratory in Washington, D.C. in the presence of a representative of the government, and the results were to be made a part of the hearing record.

After some housekeeping details, the judge then closed the hearing. An hour later, all counsel were suddenly asked to return to the courtroom. At that time the government recalled Agent Hodge, who testified that after leaving the stand, he had shown the report in question to his assistant (who, unknown to the defense, had been brought to Bismarck), and had been informed by him that the handwriting was not his. Hodge further stated that he did not know the identity of the person who had written the document.

Judge Benson, noticeably affected by these disclosures, then ordered the government to turn over to defense counsel xeroxed copies of all the RESMURS ballistics notes. He also directed the government to attempt to determine just who had written the report at issue. Finally,

41. The motions for a new trial were filed on April 20, 1982, pursuant to 28 USC §2255, and on December 15, under Fed.R.Crim.P. 33.

42. *U.S. v. Peltier*, 731 F.2d 550, 555 (8th Cir. 1984) (*per curiam*).

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he reopened the hearing, pending whatever additional evidence developed from the new turn of events. The Bureau forwarded copies of the ballistics notes to Peltier's attorneys. In November, the government announced that the handwriting on the key report (about the match between the crucial .223-caliber casing and the defendant's AR-15) was that of an agent trainee named William Albrecht, who had worked in the office for a short time during the investigation.

From the time of Hodge's first testimony, Peltier had contended that the ballistics evidence against him was fabricated. His attorneys argued that the government's failure to disclose the teletypes violated Peltier's due process rights. They also contended that the FBI's inability to identify within a reasonable time the third person who had helped prepare the ballistics report cast doubt on the ballistics expert's testimony at the hearing, and supported accepting the teletype's conclusion that the shell casings near the scene were not from the rifle attributable to Peltier. Peltier's attorneys argued that a new trial should therefore be granted. Nonetheless, on May 22, Judge Benson denied the request for a new trial "because the October 2, 1975 teletype . . . would not have affected the outcome of the trial, and does not create a reasonable doubt that did not otherwise exist. Peltier has failed to establish constitutional error." According to Judge Benson, the fact that the ballistics expert "could correct an error he had made in his earlier testimony adds to, rather than detracts from, his credibility."⁴³

Peltier's Appeal of the Denial of a New Trial

In the summer of 1985, Peltier appealed the denial of his request for a new trial. Approximately eleven months later, on September 11, 1986, the Court of Appeals for the Eighth Circuit rendered its decision. The Court's opinion stated,

There is a possibility that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available to him in order to better exploit and reinforce the inconsistencies casting strong doubts upon the government's case. Yet, we are bound by the *Bagley* test requiring that we be convinced, from a review of the entire record, that had the data and records withheld been made available, the jury probably would have reached a different result.⁴⁴ We have not been so convinced.

The Court of Appeals, on this rationale, denied Leonard Peltier a new trial.⁴⁵

Compelling Circumstances Which Justify a Pardon

Now that the case has received exhaustive legal review, justice requires that Leonard Peltier be granted a

pardon. The extraordinary circumstances of Peltier's case provide many compelling reasons for the President to exercise his executive power to issue a pardon.⁴⁶

(1) *The prosecution renounced their own theory of the case.* A criminal conviction is supposed to require proof beyond a reasonable doubt. However, in the Peltier case, the prosecution had major doubts about what was proven. The prosecution was unable to come up with a consistent theory of the case. At trial, the government argued that Peltier was the principal in the death of the agents, whereas on appeal, the prosecuting attorneys did an about-face and conceded flat out that they had no idea who the principal in the killings was, and that they were arguing (and had argued) that Peltier was an aider and abettor. This demonstrates that the prosecution had no idea of what Peltier's role, if any, really was on the day of the firefight. In its brief to the Eighth Circuit, the prosecution falsely stated that, "it was never contended that the Appellant had personally fired any of the three final killing shots . . ."⁴⁷

(2) *Pattern of falsification.* The FBI, or some members of the FBI, engaged in a pattern of falsifying evidence of every sort for every purpose. They fabricated a false motive by setting up a fight in Milwaukee. They fabricated the story of Peltier having a vehicle and of that vehicle being the one chased by the agents. They fabricated and withheld ballistics evidence, and misrepresented facts, so as to give the impression that there was only one AR-15 rifle present. — Peltier's.⁴⁸ They coerced witnesses into giving false testimony both for extradition and for trial. They did not disclose the existence of other suspects in the case. They arranged for coroners to find false causes of death, and to ignore true causes of death. The prosecution condoned most of this fraud directly. The case is so saturated with fraud and deceit that nothing about it

46. The author has coordinated the current effort to petition the President for a pardon in Peltier's case, with the sponsorship of Senator Daniel Inouye of Hawaii.

47. Contrast that claim with these excerpts from the government's closing argument at Peltier's trial: "we have submitted strong circumstantial evidence which indicates that Leonard Peltier did in fact fire the fatal shots . . . I think that he did, and I think the evidence shows he did." Trans. at 4974. "The evidence . . . indicates that Leonard Peltier was not only the leader of this group, he started the fight, he started the shootings and that (sic) he executed these two human beings at point-blank range." Id. at 4975-76. "Apparently Special Agent Williams was killed first. He was struck in the face and hand by the bullet, as I have demonstrated, probably begging for his life, and he was shot. The back of his head was blown off by a high-powered rifle. Leonard Peltier then turned, as the evidence indicates, to Jack Coler lying on the ground helpless. He shoots him in the top of the head. Apparently feeling that he hadn't done a good enough job, he shoots him again through the jaw, and his face explodes." Id. at 4996. "[W]e [have] proved that he [Peltier] went down to the bodies and executed these two young men at pointblank range." Id. at 5019.

48. The Eighth Circuit concluded "that the evidence supports the view that there was at least one other AR-15 on the compound on the day of the murders." "We turn . . . to the question of whether there was only one AR-15 on the compound on June 26. The answer to that question must be no." *U.S. v. Peltier*, 800 F.2d 772 at 775 n.2 and 779 (1986).

43. *United States v. Peltier*, 609 F.Supp. 1143 at 1152 (D.N.D. 1985).

44. *United States v. Bagley*, 473 U.S. 667 (1985).

45. *United States v. Peltier*, 800 F.2d 772 (8th Cir. 1986).

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can be trusted. It reeks of injustice, and some agency of this government — judicial, executive, or legislative — must take action to remedy this horrible wrong, so that there can again be trust in the courts and the executive agencies of this nation.

(3) *Exclusion of crucial evidence at trial, and inconsistent evidentiary standards.* While Peltier's co-defendants were acquitted after presenting a self-defense argument, showing the pervasive climate of fear and violence on the reservation in which the FBI played a prominent role, Peltier was not allowed to present any such evidence or witnesses. The defense was barred from demonstrating at trial the importance of inconsistencies in the ballistics

"We recognize that there is evidence in this record of improper conduct on the part of some FBI agents, but we are reluctant to impute even further improprieties to them." — Eighth Circuit, United States v. Peltier, 1986

reports by an evidentiary ruling by Judge Benson, which "clearly hampered the defense[.] . . . [T]he argument foreclosed by the ruling could have been significant."⁴⁹ Furthermore, the defense was prohibited from using at trial the falsified affidavits of Myrtle Poor Bear to show prosecutorial and FBI coercion and fraud; the government, however, was allowed to use the affidavits to illegally extradite Peltier from Canada in order to bring him to trial. There can be no justice in condoning this sort of blatant double standard.

(4) *Judicial tolerance of prosecutorial deception.* The FBI and the Justice Department intentionally went "judge shopping" to find a court that would be willing to limit the evidence and witnesses in Peltier's trial to prevent the same conclusion as Butler and Robideau's jury had reached — that the FBI and the government-supported tribal administration on Pine Ridge reservation had created such a climate of fear that the defendants reasonably acted in self-defense in participating in the firefight. Many Native Americans agree with Peltier that Judge Paul Benson, the trial judge in Peltier's case, acted unconscionably in the hearing and the handling of the case. The prosecution had come with unclean hands, and the judge knew it, allowed it, and ruled despite it. From the beginning of Peltier's trial, Benson's court was biased. In retrospect, this is no surprise. Benson had built a reputation of prejudice against Indians. In 1981, the conviction of an Indian defendant was reversed by the Eighth Circuit because Judge Benson's charge to the jury in the case was seen by the appellate court as improperly raising the stereotype of a "drunken Indian" in the minds of the jurors.⁵⁰

(5) *Judicial conflict of interest.* All citizens have a right to an unbiased judge. William Webster, one of the three appellate judges who heard Peltier's appeal of his original conviction for the FBI agents' murders, was under consideration for the job of FBI Director at the time of oral argument, and actually was appointed to the post shortly thereafter. This situation creates at a minimum a strong appearance of conflict of interest, such that Judge Webster should have recused himself.

(6) *Escape in self-defense resulted in an increased sentence.* Peltier's life was threatened by an apparent government plot to kill him while in prison, forcing his escape attempt which resulted in a yet greater sentence.

(7) *Suppression of crucial evidence.* The other main incident of prosecutorial misconduct was the illegal suppression of crucial evidence, known as the "Brady material," from the defense. A FOIA request revealed that during trial the federal prosecutors possessed the teletype with ballistics test results, showing that the rifle recovered by the FBI, and used by the prosecution to link Peltier to the murders, contained a different firing pin than the rifle apparently used for the murders. This was important exculpatory evidence and the defense had a right to have access to it. On Peltier's motion to vacate the trial court's judgment and for a new trial, the appeals court concluded that the data contained in the ballistics report was "improperly withheld" from the defense.⁵¹ However, the court incorporated the "Bagley test" as the standard for granting a new trial. *Bagley*⁵² required a showing that the jury would "probably" have acquitted the defendant, had the withheld evidence been made accessible to the defense. The appeals court in this case held that instead there was "a possibility that the jury would have acquitted Peltier"⁵³ if the defense had been able to use the exculpatory evidence. Because it held that a different outcome was "possible" rather than "probable," the Circuit Court affirmed the district court's denial of Peltier's motions.

(8) *The fallacy of the Bagley standard in cases of prosecutorial misconduct.* The appellate court acknowledged error, misconduct and fraud in the lower court. The appellate court recognized that, had the government obeyed the law during the conduct of the trial, Peltier could have put on a better defense and there was a definite possibility that he would not have been found guilty. And yet the appellate court let the conviction stand, and would not grant a new trial. To require, as the Eighth Circuit did, that the defendant show the jury "probably" would have acquitted if the prosecution had not engaged in fraud and deceit is to turn the fundamental concept of our criminal justice system — "innocent until proven guilty" — on its head.

Once a defendant and the court have been defrauded by their own government, the government is at a definite advantage in requiring a defendant to meet this "probability" standard. The Eighth Circuit in this case, and the *Bagley* decision itself, have invited widespread prose-

49. The Eighth Circuit in *United States v. Peltier*, 800 F.2d 772 at 777, text and n.8.

50. *United States v. Lavallie*, 666 F.2d 1217 (8th Cir. 1981).

51. 800 F.2d 772 at 780 (8th Cir. 1986).

52. 473 U.S. 667 at 684 (1984).

53. *Id.* at 779-80, emphasis added.

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cutorial and investigative abuse, because withholding and misrepresenting evidence can be seen as a good bet tactically. What is the risk/benefit analysis for suppressing or fabricating evidence, or coercing witnesses, under the "probability" rule? From the point of view of an unethical prosecutor or law enforcement official, the choice is not difficult. If you choose to misrepresent evidence, the worst that is likely to happen is that you will get caught at trial, have to make some excuse about inadvertent error, have to endure some verbal questioning of your competence or credibility, get a slap on the wrist, and proceed to make the best legitimate case you can — which is the same boat you would have been in had you not attempted the fraud. On the other hand, if you fabricate evidence and get by with it, you win big.

Finally, if you fabricate evidence and don't get caught until the conviction is appealed, then you avoid the real burden of proving, with legitimate evidence, that the defendant was guilty beyond a reasonable doubt. You manage to shift the burden largely to the defendant, who will now be presumed guilty as convicted on the false evidence, to show that, had the fraud not occurred, the

The prosecution had come with unclean hands, and the judge knew it, allowed it and ruled despite it.

jury would probably have acquitted him. The task of convincing an appellate court panel that a jury probably would have acquitted is not the same burden as convincing the jury in the first instance that there was a mere *reasonable doubt* about one's guilt after the prosecution has met, if it can, its burden of making a *prima facie* case.

Peltier's appeal should, in any case, have been held to meet the requirements of *Bagley*. The Court in *Bagley* instructed reviewing courts to assess the possibility that evidence withheld might have materially changed the outcome of the trial, "with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."⁵⁴ It is impossible to say with certainty what the defense and jury would have made of the evidence had it been available, but the discrepancies that it would have revealed in the government's case were central to the defense effort. Even the Circuit Court, in denying a new trial, said it felt "discomfort" with the decision.

The *Bagley* test, however, is not adequate in cases of demonstrated, recurrent misconduct by the prosecution. On the motion for new trial, the Eighth Circuit acknowledged that the known instances of government misconduct were debilitating to Peltier's defense efforts. The court declined, however, to draw any conclusions from the pattern of FBI and prosecutorial behavior. "We recognize that there is

evidence in this record of improper conduct on the part of some FBI agents, but we are reluctant to impute even further improprieties to them."⁵⁵ Why?

The very fact that evidence was systematically withheld or fabricated, as federal district court and appellate judges have recognized in this case, ought to create the presumption that *other* evidence in the case may be tainted; that the prosecution from the outset has placed obtaining a conviction at any cost over the defendant's due process rights. Thus, the cure is not to try to salvage a verdict from a thoroughly compromised trial. A new trial, at the least, is required.

In oral argument in Peltier's initial appeal of conviction, Judge Ross of the Eighth Circuit asked the prosecutor, United States Attorney Evan Hultman, about the use of the falsified Myrtle Poor Bear affidavits.

Judge Ross: But can't you see, Mr. Hultman, what happened happened in such a way that it gives some credence to the claim of the —

Mr. Hultman: I understand, yes, Your Honor.

Judge Ross: — the Indian people that the United States is willing to resort to any tactic in order to bring somebody back to the United States from Canada.

Mr. Hultman: Judge —

Judge Ross: *And if they are willing to do that, they must be willing to fabricate other evidence.* And it's no wonder they [Native Americans] are unhappy and disbelieve the things that happened in our courts when things like this happen.

Mr. Hultman: Judge Ross, I in no way do anything but agree with you totally.⁵⁶

Conclusion, in Peltier's words

The wrongful Canadian extradition is reason enough to grant a new trial for Peltier; it is also enough to grant Peltier a pardon. Yet freedom still eludes him — after fifteen years of prison, disclosures of outrageous miscarriages of justice, and a groundswell of support worldwide. On August 21, 1990, Peltier stated:⁵⁷

"After I was arrested and court procedures began against me, I was able to see just what kind of justice I was going to be dealt. I knew and made statements that the only way I would win my freedom from imprisonment was after the people, the masses throughout the world were educated to the facts and demanded it. My freedom would not be won in the courts.

"Today, these same beliefs are stronger than ever, because I know even if I file another appeal and a new trial is ordered, it would not be because the courts finally realize their past errors and injus-

54. *United States v. Bagley*, 473 U.S. 667 at 683 (1984).

55. *United States v. Peltier*, 800 F.2d 772 at 778 (8th Cir. 1986).

56. Quoted in *Price v. Viking*, 881 F.2d 1426 at 1442 (8th Cir. 1989) (emphasis added).

57. Interview with the author.

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tices used to convict me, but because the people of the world demand it.

"We have proven every time I was allowed in the courtroom that the government fabricated evidence against me. Because of the media blackout of the facts related to each appeal, the courts denied my appeals. So, how can I or any Native American or minority, including poor whites, have any faith, let alone any hope of justice, in the U.S.A. judiciary system? We have none, because it has been proven to us, over and over again, that there is none for us.

"After nearly fifteen years of imprisonment, my case has begun to get the attention needed for a chance at justice. A documentary is being prepared by Robert Redford, a major film is being prepared, the frivolous multi-million dollar libel suits against the book, *IN THE SPIRIT OF CRAZY HORSE*, by Peter Matthiessen, have been resolved with our victory.⁵⁸ All of these favorable things happening in my behalf are results of people who volunteered support and believed in justice throughout these difficult fifteen years.

"Of course, if by some chance the U.S. government refuses to respond to mass pressure, and my fate is to perish inside of a locked prison cell, I and my supporters will still know that this was one Indian warrior who refused to submit to what is considered by many Indian people the most evil government on the face of the Earth. And the mark of my resistance will forever leave a scar in their law history books for future generations to see."

Leonard Peltier's Statement at Sentencing, in the court of Judge Benson, the District of North Dakota

There is no doubt in my mind or my people's minds that you are going to sentence me to two consecutive life terms. You are, and have always been, prejudiced against me and any Native Americans who have stood before you; you have openly favored the government all through this trial, and you are happy to do whatever the FBI would want you to do in this case.

I did not always believe this to be so. When I first saw you in the courtroom in Sioux Falls, your dignified appearance misled me into thinking that you were a fair-minded person who knew something of the law, and who would act in accordance with the law. Which meant that you would be impartial, and not favor one side or the other in this law suit. That has not been the case, and I now firmly believe that you will impose consecutive life

terms solely because that way you think you will avoid the displeasures of the FBI. Neither my people nor myself know why you would be so concerned about an organization that has brought so much shame to the American people. But you are. Your conduct during this trial leaves no doubt that you will do the bidding of the FBI without any hesitation.

You are about to perform an act which will close one more chapter in the history of the failure of the United States courts and the failure of the people of the United States to do justice in the case of a Native American. After centuries of murder . . . could I have been wise in thinking that you would break that tradition and commit an act of justice? Obviously not! Because I should have realized that what I detected in you was only a very thin layer of dignity and surely not of fine character.

If you think my accusations have been harsh and unfounded, I will explain why I have reached these conclusions, and why I think my criticism has not been harsh enough. First, each time my defense team tried to expose FBI misconduct . . . and tried to present evidence of this, you claimed it was irrelevant to this trial. But the prosecution was allowed to present their case with evidence that was in no way relevant — for example: an automobile blowing up on a freeway in Wichita, Kansas; an attempted murder in Milwaukee, Wisconsin, for which I have not been found innocent or guilty; or a van loaded with legally purchased firearms, and a policeman who claims someone fired at him in Oregon state. The Supreme Court of the United States tried to prevent convictions of this sort from passing into law [by holding] that only past convictions may be presented as evidence . . . This court knows very well I have no prior convictions, nor am I even charged with some of these alleged crimes; therefore, they cannot be used as evidence in order to receive a conviction in this farce called a trial. This is why I strongly believe you will impose two life terms, running consecutively, on me.

Second, you could not make a reasonable decision about my sentence because you suffer from one of at least three defects that prevent a rational conclusion. You plainly demonstrated this in your decision about the Jimmy Eagle and Myrtle Poor Bear aspects of this case. In Jimmy's case, only a judge who consciously and openly ignores the law would call it irrelevant to my trial; in the mental torture of Myrtle Poor Bear you said her testimony would shock the conscience of the American people if believed! But you decided what was to be believed — not the jury. *Your* conduct shocks the conscience of what the American legal system stands for — the search for the truth by a jury of citizens. What was it that made you so afraid to let that testimony in? Your own guilt of being a part of a corrupted pre-planned trial to get a conviction, no matter how your reputation would be tarnished? For these reasons, I strongly believe you will do the bidding of the FBI and give me two consecutive life terms.

Third, in my opinion, anyone who failed to see the relationship between the disputed facts of these events surrounding the investigation used by the FBI — in their interrogation of the Navajo youths; Wilford Draper, who was tied to a chair for three hours and denied access to

58. FBI Agent David Price brought suit against Matthiessen, Viking Penguin publishing company and Bruce Ellison, one of Peltier's lawyers, alleging defamation, intentional infliction of emotional distress, and invasion of privacy. He sought \$25 million in compensatory damages, as well as punitive damages. The defendants' legal costs exceeded \$1 million, and Viking withdrew the book from circulation pending the resolution of the case. The suit was eventually dismissed on state law and constitutional grounds. *Price v. Viking Penguin & Peter Matthiessen*, 881 F.2d 1426 (8th Cir. 1989).

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his attorney; the outright threats to Norman Brown's life; the bodily harm threatened to Mike Anderson; and, finally, the murder of Anna Mae Aquash — must be blind, stupid, or without human feelings. So there is no doubt and little chance that you have the ability to avoid doing today what the FBI wants you to do . . . which is to sentence me to two life terms running consecutively.

Fourth, you do not have the ability to see that the conviction of an AIM activist helps to cover up what the government's own evidence showed: that large numbers of Indian people engaged in that fire fight on June 26, 1975. You do not have the ability to see that the government must suppress the fact that there is a growing anger amongst Indian people and that Native Americans will resist any further encroachments by the military forces of the capitalistic Americans, which is evidenced by the large number of Pine Ridge residents who took up arms on June 26, 1975, to defend themselves. Therefore, you do not have the ability to carry out your responsibility towards me in an impartial way, and will run my two life terms consecutively.

Fifth, I stand before you as a proud man; I feel no guilt! I have done nothing to feel guilty about. I have no regrets of being a Native American activist — thousands of people in the United States, Canada, and around the world have and will continue to support me [and] to expose the injustices which have occurred in this courtroom. I do feel pity for your people, that they must live under such an ugly system; you are taught greed, racism, and corruption — and most serious of all, the destruction of Mother Earth. Under the Native American system we are taught all people are Brothers and Sisters; to share the wealth with the poor and needy. But the most important of all is to respect and preserve the Earth, who we consider to be our Mother. We feed from her breast; our Mother gives us life from birth, and when it's time to leave this world, who again takes us back into her womb. But the main thing we are taught is to preserve her for our children and our grandchildren, because they are the next who will live upon her.

No, I'm not the guilty one here; I'm not the one who should be called a criminal. White racist America is the criminal, for the destruction of our lands and my people. To hide your guilt from the decent human beings in America and around the world, you will sentence me to two consecutive life terms without any hesitation . . .

If you were impartial, you would have had an open mind on all the factual disputes in this case. But you were unwilling to allow even the slightest possibility that a law enforcement officer would lie on the stand. Then how could you possibly be impartial enough to let my lawyers prove how important it is to the FBI to convict a Native American activist in this case? You do not have the ability to see that such [a] conviction is an important part of the efforts to discredit those who are trying to alert their Brothers and Sisters to the new threat from the white man, and the attempt to destroy what little Indian land remains in the process of extracting our uranium, oil, and other minerals. Again, to cover up your part in this, you will call me [a] heartless, cold-blooded murderer who deserves two life sentences consecutively . . .

Finally, I honestly believe that you made up your mind long ago that I was guilty, and that you were going to sentence me to the maximum sentence permitted under the law. But this does not surprise me, because you are a high-ranking member of the white racist American establishment, which has consistently said, "In God We Trust," while they went about the business of murdering my people and attempting to destroy our culture.

